IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.A No.529 of 2003

Decided on : April 3, 2007

Ishro @ Jhajhar **…..Appellant.**

VERSUS

State of H.P. **…..Respondent.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?

For the Appellant : **Mr. Ramesh Thakur, Advocate.**

For the Respondent : **Mr. Ashok Chaudhary, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.**

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appellant is aggrieved by the judgment of the Sessions Court whereby he has been convicted of offence of committing rape on a child, aged about 10½ years, and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo simple imprisonment for a further period of one year.

3. Appellant was sent up for trial for an offence, punishable under Section 376 of the Indian Penal Code, for allegedly raping a minor girl, aged about 10½ years, on 7th December, 2001, around 8 p.m. According to the prosecution, the child alongwith 3-4 other children was playing in the courtyard in a house where a marriage was taking place, when the appellant went there, physically lifted the girl and carried her to

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Whether the reporters of the local papers may be allowed to see the Judgment?

a lonely place. When the prosecutrix (the child) tried to raise alarm, the appellant allegedly gagged her. The children, who were playing with the prosecutrix, also raised alarm. The people went in search of the girl and the appellant. After a considerable gap of time the girl was found at a deserted place with injuries on her private parts. Next day, the girl was taken to the police station by the sister of her grandfather, who had accompanied her to the marriage function. Report was lodged with the Police. Prosecutrix was got medically examined. Doctor found that the girl had been subjected to vaginal penetration recently. Statement of the prosecutrix was recorded by the Police. She named the appellant as the rapist.

4. Appellant was charged with the offence, under Section 376 of the Indian Penal Code. On his pleading not guilty, the appellant was put on trial. At the end of the trial, the Court found him guilty and accordingly convicted him of the offence, under Section 376 of the Indian Penal Code, and awarded the aforesaid sentence.

5. Grievance of the appellant is that the evidence has not been appreciated correctly. Learned counsel submits that it was dark on the spot and the prosecutrix, being a child, was unable to identify the offender, particularly when it was dark and there being no light it was not possible for the child to identify the offender. Also, it has been submitted, though half heartedly, that the appellant has been falsely implicated due to enmity.

6. Having considered the aforesaid submissions, in the light of the evidence on record, we find no merit in either of them. As regard the first submission, it is true that the incident had taken place around 8 p.m., in the month of December, when it was supposed to be quite dark, but

the fact remains that the prosecutrix was physically lifted by the offender and, therefore, the prosecutrix was supposed to be in very close proximity of the offender and hence in a position to recognize her even though it was dark. The prosecutrix, in her deposition as PW-13, though admitted that it was dark when the offence was committed, she emphatically denied another suggestion put to her in the cross-examination that she was not in a position to recognize the offender or that the offender was someone different from the appellant. The testimony of the prosecutrix is corroborated by the earliest version, which was given to the Police vide FIR, Ex. PW-2/A. In the FIR lodged by PW-2 Guro Devi, the sister of the grandfather of the prosecutrix, it is stated that the children, who were playing with the prosecutrix, raised alarm when the prosecutrix was physically lifted and carried away and they told that it was Ishro (the present appellant) who had taken away the prosecutrix. Of course, the children have not been examined by the prosecution during the course of trial but what they disclosed immediately after the prosecutrix was taken away is relevant, being res gestae. PW-2 Guro Devi has categorically stated that the children had informed that the prosecutrix had been taken away by Ishro, the appellant. Her testimony is corroborated by the contents of FIR, copy Ex. PW-2/A.

7. Medico Legal Certificate also corroborates the prosecution version. Dr. Amit Gupta PW-6, who examined the prosecutrix, stated that the child had been subjected to vaginal penetration recently. He conducted the medical examination of the prosecutrix on the day next following the evening of the commission of the crime.

8. In view of the abovestated position, first submission is rejected, being without merit.

9. Coming to the next submission, there is absolutely no material on record suggesting that there was any enmity between the appellant and the family members of the prosecutrix. A suggestion was thrown to Guro Devi PW-2 during the course of her cross-examination that her husband's elder brother had had a quarrel with the appellant. She denied the suggestion. There is no evidence that there had been any quarrel between the brother of the husband of Guro Devi and the appellant. In any case, even if it is assumed for the sake of argument that some quarrel had taken place that could not have been a motive for false implication of the appellant in a case of rape, because whenever there is an allegation of rape, the honour of the prosecutrix, even though a child, is always at stake. No suggestion was put to the prosecutrix herself about the alleged enmity. Appellant, in his statement under Section 313 Cr.P.C., did not say that a quarrel between him and the brother of Guro Devi's husband had taken place and so he had been falsely implicated, though he did say that the witness had deposed falsely, on account of enmity. Hence, the second submission is also rejected being devoid of merit.

10. As a sequel to the above discussion and findings, the appeal is dismissed.

(Surjit Singh), J.

April 3, 2007(sd) **(Rajiv Sharma), J.**